

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 742 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and

MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed
to see the judgement? - YES

2. To be referred to the Reporter or not? - YES

3. Whether Their Lordships wish to see the fair copy
of the judgement? - NO

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? - NO

5. Whether it is to be circulated to the Civil Judge?
- NO

MAFAJI MOVATAJI THAKOR

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS for Petitioner

MR KP RAVAL, APP for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and

MR.JUSTICE A.K.TRIVEDI

Date of decision: 08/10/98

ORAL JUDGEMENT (per J.N. Bhatt, J.)

The short question which surfaces in this appeal before us is, as to whether the order of conviction and sentence recorded by the learned Addl. Sessions Judge, Mehsana, in Sessions Case No. 49 of 1993, on 25.6.1993, holding the accused guilty under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) is vulnerable, in view of the provisions of Section 50 of the NDPS Act?

The appellant - original accused was charged before the trial Court, as per Exh.2, under Section 20 read with Section 8 of the NDPS Act for having possession of 15 gms. of contraband article Charas, which was searched and seized from his pocket of the pant, at about 9.00 a.m. on 13.12.1992, in the area, known as Ganj Bazar in Mehsana town, to which he denied and claimed to be tried.

The prosecution case has been that, on the aforesaid day and time, the accused was found in possession of 15 gms. of Charas, on being raided and searched by the Police party led by PW-3 Police Inspector Mr.S.A.Parmar (Exh.19). Upon the prior information, said Mr.Parmar of City Police Station, Mehsana, conducted the raid. As per the prior information, accused Mr.Thaker Mafaji, was dealing with contraband article like Charas without licence and permit. Upon getting the information, panchas were called and they were informed about the intimation received by the police. The first part of the panchnama was prepared in the police station. Thereafter, complainant Mr. Parmar led the team to the Ganj Bazar area. It was noticed by the raiding party that the accused was dealing with and selling Charas in the market known as Ganj Bazar. After observing the necessary formalities, the person of the accused was searched and in the course of the search, 15 gms. of Charas was recovered from the pocket of the pant of the accused. It was wrapped in polythene bag which bore mark of "Mahesh Tea". The contraband article was weighed after bringing a scale from a Gold Smith and the said article weighed about 15 gms. Upon being asked, the accused had no any pass, permit or licence required under the NDPS Act.

The muddamal Charas was collected and packed up in a cloth bag and after stitching it, the signatures of panchas and the officials were put on the cover with a seal of Mehsana Police Station. Thereafter PSI Mr.Barot who was also forming the raiding party lodged the complaint before PI Mr.Parmar, which is at Exh.16. The offence came to be registered against the accused with a

Yadi of Mehsana Police Station to CPO. The accused was also arrested. The chargesheet followed, and thereafter the accused was charged, as stated hereinabove, at Exh.1 by the trial Court, under Section 20 read with Section 8 of the NDPS Act. The muddamal sample which was collected after observing the necessary procedure, was forwarded to the Forensic Science Laboratory (FSL), for opinion and report and upon receipt of the report, produced at Exhs.9 and 10, it was noticed that the sample collected and seized from the pocket of the accused was contraband article Charas.

In order to substantiate and fortify the charge against the accused person, the prosecution placed reliance on three prosecution witnesses. PW-1 Chandulal Chimanlal is examined at Exh.12. He was one of the panchas. He has fully supported the prosecution case. It is evident from his testimony, at Exh.12 that, along with other panch Girish Parmar, the Police Inspector had raided and searched the accused. When the raiding party in a police jeep reached in the Ganj Bazar area, at that time, the accused, on seeing the police jeep, started fleeing, who was caught by the police and his person was searched in presence of panchas by the police officers. The second part of the panchnama was concluded. It was produced at Exh.14 before the trial Court. It becomes very clear from the evidence of the panch witness Chandulal that the accused was found in possession of 15 gms. of Charas which was seized by the police. After observing the necessary procedure for collecting the sample for the purpose of analysis report of the FSL, the said substance was placed in a tin box and it was sealed. The note signed by the panchas, members of the raiding party and the accused were prepared, of which one was placed inside the tin. The panchnama prepared in this behalf, at Exh.14, between 8.30 to 8.40 p.m. on 13.12.1992 fully supports the panch witnesses as well as the case of the prosecution. It is also noticed from the report of the Director of FSL that the muddamal Charas seized and recovered from the person of the accused in presence of the panchas by the police and sent to the FSL was the same which was, upon analysis, came to be detected as contraband article Charas. The accused was possessed of this contraband article without any permit and pass. The evidence of panch Chandulal, at Exh.12, fully supports the prosecution case. It is also clearly established from the record of the present case that, the accused was possessed of 15 gms. of Charas illegally, without any pass or permit.

The PW-2 PSI Mr. N.K.Barot who was also present all

throughout along with PI Mr.Parmar is examined at Exh.15. It is very clear from his evidence that the accused was holding conscious illegal possession of the contraband article Charas. The search of muddamal article Charas and the seizure was effected in presence of panchas and witness PSI Mr.Barot. It is also clear from the evidence of PSI Mr.Barot that, after drawing the first part of the panchnama, upon receipt of the information from an informant, the raid was arranged and effected, on 13.12.1992, in Ganj Bazar area of Mehsana and the accused who was fleeing away, on seeing the police jeep, was caught and searched and from the right side pocket of his pant, the contraband article Charas was seized and recovered. It is also found from his evidence that the accused is a habitual offender. In his cross examination, it is revealed that the accused was tried in a number of criminal cases. He was also externed. Many cases of prohibition were filed against him. He was also detained under the Prevention of Anti-Social Activities Act, 1985 (PASA Act). Of course, he came to be released from the detention under the PASA Act, by the order of this Court. The accused was, thus, found to be a habitual offender. It was elicited in the cross examination by the defence for the sole reason that the police, because of his bad antecedent and criminal activities in past, made a false case and framed him in the present case. This specific suggestion put to the police officials came to be positively denied. He had also lodged the complaint, produced at Exh.16. The complaint was recorded by PI Mr.Parmar as narrated by PSI Mr.Barot. It was immediately lodged after the search and seizure. It also fully supports the evidence of PSI Mr.Parmar and lends material corroboration to the prosecution that the accused was possessed of Charas illegally.

So is the evidence of PI Mr.Parmar, PW-3, at Exh.19. We have gone through his evidence, dispassionately, and found that his evidence directly compaginate the accused with the complicity so charged. No infirmity is, successfully, pointed out from the testimony of the three witnesses relied upon by the prosecution. The evidence of panchas as well as the two police officers clearly corroborates the prosecution case.

It was vehemently contended on behalf of the appellant original accused that there was a breach of the provisions of Section 50 of the NDPS Act as the accused was not informed about his right to be searched in presence of a Gazetted Officer. This submission, in our opinion, is totally, meritless. The reliance on the

decision of the Honourable Supreme Court in STATE OF PUNJAB v. BALBIR SINGH, reported in AIR 1994 SC 1872, is of no avail to the accused in his defence, in the present case.

No doubt, the proposition of law enunciated in Balbir Singh's case (supra) is very clear that the provisions of Section 50 of the NDPS Act are mandatory and in the event of infraction thereof, the trial shall be vitiated. There is no question of infraction of the provisions of Section 50 in the present case. The head of the raiding party was PI Mr. Parmar and he is, admittedly, a Gazetted Officer. PI Mr. Parmar was, therefore, an officer as contemplated by the provisions of Section 41(2) of the NDPS Act. He was not a delegate of the authorised officer appointed under Section 41(2). We have no hesitation in finding that the accused was searched by PI Mr. Parmar who was acting as authorised Gazetted Officer, under Section 41(2) and not an authorised person under Section 42(1) of the NDPS Act. The question of violation of the provisions of Section 50, therefore, does not arise in the present case. It was, therefore, not necessary for the PI to comply with the provisions of Section 50 of informing the accused about his right to be searched in presence of a Gazetted Officer or a Magistrate. Since he was himself an authorised Gazetted Officer contemplated by the provisions of Section 41(1) and not under Section 42(1) of the NDPS Act, in our opinion, there was no any breach of the mandatory provisions of Section 50 of the NDPS Act.

No doubt, it is true that, it is obligatory on the part of the officer who is not a Gazetted Officer to inform the person to be searched and when the officer undertaking the exercise is one of the officers under Section 42(1) and not a Gazetted Officer, he is obliged to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate would tantamount to non-compliance of the provisions of Section 50 of the NDPS Act. The view which we are inclined to take, at this juncture, is very much reinforced by the following Division Bench decisions of this Court:

(1) DHANPAL SINGH BARUN SINGH THAKUR & ORS.,
v. STATE OF GUJARAT, reported in 37(1)
GLR 219;

(2) ANWAR @ ANUDO ALIMAMAD PATHAN v. STATE
OF GUJARAT, reported in 37(1) glr 539;
and

- (3) MUKESH NATVARLAL MODI v. H.S.BAROT AND
ANR., reported in 39(1) GLR 639; and
- (4) MOHMADKHAN RASULKHAN PATHAN v. STATE OF
GUJARAT, reported in 39(1) GLR 445.

In view of the aforesaid discussion, the first submission vehemently, repeatedly, agitated on behalf of the accused in the defence is, as such, without any merit and running counter to the proposition laid down by this Court in the aforesaid decisions. Therefore, the first contention must fail. Accordingly, it is rejected.

It will lead us to the consideration of the second submission pertaining to the alleged contradictions and discrepancies in the evidence of the prosecution witnesses. The following discrepancies were to be highlighted in support of this appeal on behalf of the accused:

(1) That there is no consistency in the evidence of the PSI and PI in respect as to who had gone to collect the panchas. In reality, even if it is presumed to be correct, then also, it cannot be said to be a material contradiction affecting the main core of the prosecution case.

(2) That there is inconsistency in the evidence about from which source the scale was brought for weighing the contraband article. The same principle applies. It is immaterial and totally insignificant as to from which source the scale was brought there.

In our opinion, the aforesaid two discrepancies highlighted before us, obviously, could not be said to be material contradiction affecting the substratum of the prosecution case and generating doubt. Both the aforesaid contradictions or discrepancies are at the micro level and they, in fact, would not, in any way, affect the main core and the substance of the prosecution case, about illegal possession of contraband article, Charas weighing 15 gms. searched and seized from the accused. It is, therefore, very clear from the evidence on record that the prosecution has established, without any doubt, that the accused was in illegal possession of the contraband article, Charas of 15 gms. and since he was found to be in exclusive, conscious possession of the contraband article, without any pass and permit under the NDPS Act, the presumption under Section 35 and Section 54 would come into play. It is, rightly, held by the trial

Court that the accused is guilty of the offence punishable under Section 20(b)(ii) read with Section 8 of the NDPS Act, as the contraband article searched and seized from the person of the accused was, positively, certified and reported to be Charas, which is covered under the contraband, prohibited item and any use or possession etc. in respect of such narcotic drug or psychotropic substance under the NDPS Act is an offence and in light of the facts and circumstances and in the clear evidence of the prosecution, the trial Court has, rightly, held the accused guilty of the offence punishable under Section 20(b)(iii) for the breach of the provisions of Section 8 of the NDPS Act and the resultant minimum prescribed punishment of 10 years' RI and to pay fine of Rs.1 lakh, in default, to undergo six months' RI has been awarded. We have no hesitation in holding that the present appeal is quite meritless as we are fully satisfied that the impugned judgment and order of the trial Court is fully justified. Hence, this appeal merits dismissal. Accordingly, we dismiss the appeal.

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